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No. 88-52

Supreme Court, U.S.
FILED
SEP 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

BUFFALO WIRE WORKS COMPANY, INC., PETITIONER

v.

UNITED STATES DEPARTMENT OF HOUSING & URBAN DEVELOPMENT, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner is entitled to payment for moving expenses under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.*, after having received such expenses in a New York condemnation proceeding.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) and the opinion of the district court (Pet. App. 3a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 12, 1988. The petition for a writ of certiorari was filed on July 8, 1988, and was served on the United States on July 11, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner seeks payment under the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601 *et seq.* (Relocation Act), which pro-

vides that federal agencies shall pay a person displaced by the acquisition of real property for a federal program or project the "actual reasonable expenses in moving * * * his * * * business" (42 U.S.C. 4622). Such payment is not required, however, "if the displaced person receives a payment required by the State law of eminent domain which is determined by [the] agency head to have substantially the same purpose and effect" as the federal payment sought (42 U.S.C. 4631(b)).

1. In 1972, petitioner moved its business after the City of Buffalo, New York acquired its property by means of eminent domain for a waterfront redevelopment project that was part of a federally assisted urban renewal program. After a condemnation proceeding conducted by the state supreme court, petitioner was awarded a total of $1,115,744.87 for the value of its land, building and movable fixtures.

Under New York law, the value of movable fixtures in a condemnation proceeding is established as the lesser of (1) "the difference between salvage value of such item[s] and [their] present value in place (*i.e.*, reproduction cost less depreciation)"; or (2) "the actual and contemplated costs of disassembling, trucking and reassembling [such items]." *Rose* v. *New York*, 24 N.Y.2d 80, 88, 246 N.E.2d 735, 298 N.Y.S.2d 968, 976-977 (1968). A New York condemnation proceeding is not intended "to place a claimant in a better position than he was before the taking by helping him to finance a new facility" (24 N.Y.2d at 88, 298 N.Y.S.2d at 977). Thus, "[i]f the cost of removal is less than the difference between salvage value and present value in place, that is all the claimant is entitled to recover" (*ibid.*).

In petitioner's case, the cost of moving its fixtures to a proposed site in West Seneca, N.Y., was estimated to be $480,744.87, which was less than the present value in place of the fixtures minus their salvage value, which the court determined to be $976,813 (see Pet. App. 7a.) The court

accordingly awarded petitioner the cost of moving the fixtures rather than their value in place minus salvage (see *ibid.*). The court expressly stated that its award to petitioner for moving its fixtures was for "the costs of disassembling, trucking, reassembling, and relocation generally" (*id.* at 24a), and included the costs of "motorization and electrical preparation of machines," "engineering," "pneumatic * * * water * * * [and] electrical disconnect and reconnect," "rigging and trucking," "moving raw materials, etc." and "realignment and rework" (*id.* at 25a). Petitioner subsequently found it possible to relocate elsewhere within the City of Buffalo, and the actual expenses of moving its fixtures amounted to only $279,266.85 (*id.* at 21a).

2. Petitioner subsequently filed a claim under the Relocation Act with the Buffalo Urban Redevelopment Agency ("BURA") for $1,605 for the "cost of moving personal property," and also sought $9,153.18 reimbursement for "search expenses," $114,107.25 for "attorney's fees," and $10,973.74 for "appraisal and witness fees" (Pet. App. 7a). After its claim had been preliminarily denied, petitioner failed to pursue the proceedings before the BURA for more than eight years (*id.* at 9a).

In the interim, petitioner defended itself against a claim by the Internal Revenue Service that the moving expenses received in the condemnation proceeding were taxable as ordinary income (see Pet. App. 9a-10a). In petitioner's tax litigation, the United States Tax Court determined that, "for purposes of Federal income taxation" (*id.* at 45a), "the portion of petitioner's condemnation award which was determined by reference to moving expenses constitutes an amount realized from the involuntary conversion of property into money rather than reimbursement for moving expenses," and thus was not taxable as or-

dinary income (*id.* at 49a). The Second Circuit, in an unpublished opinion, affirmed the Tax Court's disposition of the issue "for the reasons stated by" the Tax Court, finding that the disputed portion of the condemnation award "was not a reimbursement of the taxpayer's moving expenses but money representing the value of property involuntarily converted by condemnation into cash" (*id.* at 56a).

3. Nearly two years after the Second Circuit's disposition of the tax claim, petitioner filed a "Restatement" of its Relocation Act claim before BURA "in light of" the tax decisions (see Pet. App. 10a) seeking a greatly increased total of $295,773.24 in "moving expenses," and $138,784.53 in "search expenses" (see *id.* at 11a). BURA denied petitioner's Relocation Act claims because of laches, noting that petitioner's restated claims were "decidedly different" from its original claims (see *id.* at 12a). The Department of Housing and Urban Development ("HUD") upheld BURA's negative determination on the grounds that petitioner's claim for search expenses was unreasonably delayed (*id.* at 30a) and that petitioner "was paid for his moving expense" in the New York condemnation proceeding (*id.* at 26a).

The district court affirmed HUD's decision, upholding the dismissal of petitioner's claim for search expenses on the grounds of laches (Pet. App. 15a) and finding that the claim for moving expenses had already been paid in the condemnation proceeding (*id.* at 21a). The court stated that, "as reflected by the itemized description" of the state condemnation award, "[t]here is certainly no question" that the relevant portion of the condemnation award "was *for* moving expenses" (*ibid.* (emphasis in original)). The court rejected petitioner's argument that in resolving the Relocation Act claim, HUD was bound by the decision of the Tax Court that the condemnation payment did not constitute reimbursement for moving expenses. The court

held that there was "no necessary incompatibility between the [Tax Court] holding * * * and HUD's finding that [petitioner's] payment had substantially the same purpose or effect as a payment for actual reasonable moving expenses," since petitioner "may have received payment having the same purpose or effect as actual moving expenses *as part of* an involuntary conversion of property into money" (*id.* at 19a (emphasis in original))). The Second Circuit affirmed in an unpublished memorandum "for substantially the reasons set forth" in the district court's opinion (*id.* at 2a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, no further review is warranted.

1. Petitioner primarily contends that since the Tax Court and the Second Circuit had decided that petitioner's condemnation award did not constitute reimbursement for moving expenses for federal income tax purposes, HUD was collaterally estopped from determining that the condemnation payment was for moving expenses within the meaning of the Relocation Act (see Pet. 7-19). As petitioner correctly recognizes (Pet. 9), however, in order for collateral estoppel to be imposed upon the federal government, the issues presented by the present case must be "in substance the same as those resolved" in the earlier litigation. See *Montana* v. *United States*, 440 U.S. 147, 155 (1979). In this case, this critical threshold requirement is not satisfied. Quite simply, the Tax Court's holding that "for purposes of federal income taxation" (Pet. App. 45a), the disputed portion of petitioner's condemnation payment was not subject to treatment as ordinary income as

moving expenses but rather constituted an involuntary conversion of property into money did not preclude HUD's finding that the payment was for moving expenses under the Relocation Act.

Section 1033 of the Internal Revenue Code (26 U.S.C.) provides that, for federal income tax purposes, no gain is recognized where property is involuntarily converted into money so long as the taxpayer purchases similar property of equal or greater value to that converted within a specified period of time. To determine whether the payment received by petitioner is subject to nonrecognition of gain under Section 1033, the characterization of the payment as moving expenses is irrelevant; it is only necessary to determine whether the payment had been received as a result of an involuntary conversion. As the Second Circuit held in *E.R. Hitchcock Co.* v. *United States,* 514 F.2d 484 (1975), Section 1033 applies to defer recognition of the entire amount received in a condemnation proceeding, even though the condemnation award in that case concededly took account of the taxpayer's moving expenses (see 514 F.2d at 486-487). The court of appeals stated:

> [I]t is an economic fact that this taxpayer received its moving expense money solely as a result of the condemnation and as a matter of state law. Its original property was actually converted by the condemnation into a sum (or sums) of money which the taxpayer utilized, concededly for qualified replacement property purchase. Economically and substantively, * * * this money received for moving expense was part of the "amount realized" on the conversion. But for the conversion it would not have been realized.

Id. at 487. See *Graphic Press, Inc.* v. *Commissioner,* 523 F.2d 585, 589 (9th Cir. 1975).

The Tax Court found that the decision in *Hitchcock* "compelled" it to hold that the disputed portion of petitioner's condemnation award "constitutes an amount realized from the involuntary conversion of property into money rather than reimbursement for moving expenses" (Pet. App. 49a). Quite clearly, however, the Tax Court understood itself to be confronted only with the issue of how the disputed portion of petitioner's condemnation award "should be treated for purposes of Federal income taxation" (*id.* at 45a). Thus, in context, the Tax Court's statements that the condemnation award was not for "reimbursement of moving expenses" (*id.* at 49a, 53a; see *id.* at 52a) were simply restatements of the court's finding that the award could not be treated as ordinary income for federal income tax purposes. Nothing in the Tax Court's opinion or the Second Circuit's affirmance suggests that the tax decisions were intended to determine the characterization of the condemnation award under any other federal statute, including the Relocation Act.

Moreover, the Tax Court determined that the disputed portion of petitioner's condemnation payment was subject to nonrecognition of gain under section 1033 because it was made "solely as [the] result of" an involuntary conversion (Pet. App. 48a (quoting *Hitchcock*, 514 F.2d at 487)). In contrast, under the Relocation Act, the fact that a payment results from an involuntary conversion is entirely irrelevant to the issue of whether the payment has "substantially the same purpose and effect" as one for moving expenses within the meaning of 42 U.S.C. 4631.[1] Thus, the

[1] Indeed, Section 4631(b)'s bar to duplicate payments will almost always involve payments that would otherwise qualify as involuntary conversions under the federal tax code, since in order for the bar to attach, the section requires that the payment be "required by the State law of eminent domain."

Tax Court's holding does not preclude a finding that petitioner's award was for moving expenses within the meaning of the Relocation Act, because, as the district court correctly held, petitioner "may have received payment having the same purpose or effect as actual moving expenses *as part of* an involuntary conversion of property into money" (Pet. App. 19a (emphasis in original)).

Hence, the issue under the Relocation Act was not "in substance the same" as that resolved by the Tax Court; accordingly, HUD was not collaterally estopped from denying petitioner's claim. See *Montana* v. *United States,* 440 U.S. at 155.

2. Petitioner also argues that the agency and the lower courts did not adequately explain why the New York condemnation award should be considered to have the same purpose and effect as a payment for moving expenses under the Relocation Act (Pet. 21-24). This argument is wholly lacking in merit. The state supreme court (1) stated that the issue before it was to "determine the costs of disassembling, trucking, reassembling and relocation generally" (see Pet. App. 24a), (2) concluded that the payment fell into the category of expenses for "Moving, etc." (see *id.* at 18a), and (3) described the payment as comprised of the numerous specific expenses that would be entailed in moving petitioner's fixtures, including the costs of "motorization and electrical preparation of machines," "engineering," "pneumatic * * * water * * * [and] electrical disconnect and reconnect," "rigging and trucking," "moving raw materials, etc." and "realignment and rework" (see *id.* at 25a). In light of these findings, discussed in the decisions of HUD (see *id.* at 24a-26a) and the district court (see *id.* at 19a-21a), further extended explanation of the conclusion that the condemnation award

constituted reimbursement of petitioner's moving expenses was hardly necessary.[2]

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[2] Contrary to petitioner's claim (Pet. 23-24), nothing in the decision below puts an enterprise that abandons its fixtures "in a substantially better position" than one that chooses to remove them. To the extent that New York condemnation law provides more money to an enterprise that abandons its fixtures than one that retains the fixtures and relocates them, the difference in condemnation awards simply reflects the fact that the displaced enterprise has retained the relocated fixtures and thus need not be compensated for the value of their use. Contrary to petitioner's claim, moreover, the value of their use to the dislocated enterprise is not necessarily a low "salvage value," but may instead approximate their in-place value at the original facility. Indeed, that is precisely why an enterprise would, as in this case, voluntarily choose the relocation option. Hence, rather than penalizing petitioner for relocating its fixtures, the lower courts in this case simply rejected petitioner's contention that Congress intended in the Relocation Act to subsidize relocation by paying petitioner for costs for which it had already received reimbursement. In any event, the facts of this case belie petitioner's contention that it has been undercompensated for its expenses. As the district court found (Pet. App. 21a), petitioner appears to have received a windfall under New York law, because its condemnation award was based on the contemplated expenses of moving its business to West Seneca, New York ($480,744.87), but petitioner actually moved its operations elsewhere in the City of Buffalo at a much lower cost ($279,266.85).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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SEPTEMBER 1988

☆ U.S. GOVERNMENT PRINTING OFFICE: 1988—202-037/60647